

Court File No. T-382-22

B E T W E E N:

FEDERAL COURT

JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS, and HAROLD RISTAU

Applicants

and

**GOVERNOR IN COUNCIL, HER MAJESTY IN RIGHT OF CANADA, ATTORNEY
GENERAL OF CANADA, and MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondents

RESPONDING MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA

Applicant's Motion to Compel re Denis Beaudoin

July 12, 2022

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I N D E X

	<u>Document</u>	<u>Pages</u>
1.	Written Representations of the Respondent, Attorney General of Canada, dated July 12, 2022	1 - 10

Court File No.: T-316-22

FEDERAL COURT

BETWEEN:

JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS, and HAROLD RISTAU

Moving Parties / Applicants

and

**GOVERNOR IN COUNCIL, HER MAJESTY IN RIGHT OF CANADA, ATTORNEY
GENERAL OF CANADA, and MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Responding Parties / Respondents

**WRITTEN REPRESENTATIONS
OF THE ATTORNEY GENERAL OF CANADA
(MOTION TO COMPEL)**

July 12, 2022

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TABLE OF CONTENTS

Overview 1

Part I – Statement of Facts 1

Part II – Points in Issue 2

Part III - Submissions 2

 i) Witness is not required to give undertakings or inform himself 2

Part IV – ORDER SOUGHT..... 4

Part V – LIST OF AUTHORITIES 5

Appendix A - Questions at issue 6

OVERVIEW

1. The applicants' motion is premised on the assumption that a witness being cross-examined on an affidavit is required to give undertakings to produce documents and inform himself regarding information outside the scope of his knowledge. This Court has stated repeatedly that there are no such obligations. On this basis, the applicants' motion must be dismissed.

2. The applicants seek production of categories of documents that go beyond the scope of the certified record. In doing so, they attempt to obtain discovery of documents to which they are not entitled in the context of an application for judicial review. Cross-examination on an affidavit is not discovery of a party in an action. It is not a venue for obtaining relevant documents in the possession of the opposite party. Cross-examination on an affidavit involves the direct testimonial evidence of the witness, Mr. Beaudoin. It is not a discovery of the RCMP or the Attorney General of Canada.

PART I – STATEMENT OF FACTS

3. On February 23, 2022, the Jost applicants commenced this application for judicial review challenging the invocation of the *Emergencies Act* and two regulations enacted thereunder.

4. In addition to the Jost application, the Attorney General of Canada is responding concurrently to three separate applications for judicial review dealing with the same or very similar subject matter.

5. On April 4, 2022, Denis Beaudoin, a superintendent with the Royal Canadian Mounted Police (RCMP), swore an affidavit setting out his personal knowledge of the manner in which the RCMP used the economic measures enacted pursuant to the *Emergencies Act*.

6. The Jost applicants elected to conduct cross-examinations in writing. All other applicants conducted cross-examinations orally.

7. The Jost applicants refused to agree to the cross-examination protocol proposed by the respondents to facilitate efficient and effective cross-examinations. All other applicants agreed to be bound by this protocol.

PART II – POINTS IN ISSUE

8. Whether Mr. Beaudoin should be required to produce the categories of documents requested by the Jost applicants.

PART III - SUBMISSIONS

i) Witness is not required to give undertakings or inform himself

9. Cross-examination on an affidavit is not equivalent to discovery in an action and is not the proper method of obtaining relevant documents in the possession of the opposite party.¹

10. A cross-examination on an affidavit is the direct testimonial evidence of the witness, in this case Mr. Beaudoin. It is not a discovery of the RCMP or the Attorney General of Canada.²

11. Unlike examination for discovery, there is no obligation on an affiant to be informed, to take steps to inform themselves, or to give undertakings. If a witness lacks knowledge of matters contained in their affidavit, that may go to the witness' credibility but does not impose any further obligation. Specifically, it does not require the witness to produce documents responsive to a question or to inform themselves and then return to answer the question.³

12. In *Ward v Samson Cree Nation*, Justice Hugessen stated:

...on a cross-examination on an affidavit there is no obligation on the part of the witness to be informed and thus no requirement that she further inform herself. If the witness cannot elucidate upon any of the facts deposed to that may go to her credibility but that is all... Cross-examination on an affidavit is not a substitute for examination for discovery either oral or documentary and is not the proper method of obtaining relevant documents in the possession of the opposite party.⁴

¹ *Jim Shot Both Sides v. Canada*, 2021 FC 280 (*Jim Shot Both Sides*) at [para 29](#), citing *Ward v Samson Cree Nation*, 2001 FCT 990 (*Ward*) at [para 3](#)

² *Autodata Ltd v Autodata Solutions Co*, 2004 FC 1361 (*Autodata*), at [para 19](#)

³ *Jim Shot Both Sides*, at [para 29](#), citing *Ward* at [para 3](#)

⁴ *Ward* at [para 3](#)

13. In *Nguesso v. Canada (Citizenship and Immigration)*, Justice Bédard rejected the argument that fairness requires that an affiant who is a federal public servant be compelled to inform herself in order to be able to respond to questions to which she does not know the answer.⁵

14. This Court has confirmed repeatedly that an affiant is not obliged to better inform themselves in order to answer questions beyond the scope of their existing knowledge.⁶

15. The Jost applicants seek production of categories of documents that go beyond the scope of the certified record. In doing so, they attempt to obtain discovery of documents to which they are not entitled in the context of an application for judicial review. An examining party is not entitled to request or demand that an affiant undertake to produce documents during cross-examination on an affidavit.⁷ Nor can an examining party expect to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession.⁸

16. Mr. Beaudoin refused to provide undertakings because he is not required to do so on a cross-examination. This position is supported by this Court's jurisprudence. For example, Prothonotary Tabib cautioned:

...a party who requests an answer by way of undertaking to make up for a witness' lack of knowledge or reliance on documents not duly produced, does so at its peril. Unless the parties have specifically agreed to adjourn the cross-examination pending completion of undertakings, or that answers given to undertakings are so clearly and demonstrably at odds with the evidentiary record that they equate to a refusal or misconduct, I can see no mechanism in the Federal Court Rules, 1998 to re-open a cross-examination to seek further production or put follow-up questions to a witness.⁹

⁵ *Nguesso v. Canada (Citizenship and Immigration)*, 2015 FC 102 at [para 111](#)

⁶ *Ottawa Athletic Club v. Athletic Club Group Inc.*, 2014 FC 672 (*Ottawa Athletic Club*) at [para 134](#); *Trevor Nicholas Construction Company Limited v. Canada*, 2008 FC 306 (CanLII) at [para 33](#); *Maheu v. IMS Health Canada*, 2003 FCT 647 at [paras 8-9](#)

⁷ *Preventous Collaborative Health v. Canada (Health)*, 2020 CanLII 32965 (FC) (*Preventous Collaborative Health*) at [para 16](#)

⁸ *Autodata* at [para 19](#)

⁹ *Autodata* at [para 20](#)

17. Other decisions of this Court have confirmed that an examining party has no right to request or demand that a witness undertake to produce documents during a cross-examination on an affidavit.¹⁰

18. In the absence of an obligation on the affiant to provide undertakings or better inform themselves, granting the applicants' motion would be tantamount to requiring Mr. Beaudoin to give undertakings to produce documents and better inform himself before undergoing further cross-examination on his answers to those undertakings. This would contradict the *Federal Court Rules* and this Court's jurisprudence, and would prejudice the respondents.

19. The applicants propose a two-tier system for cross-examinations: a witness must give undertakings to produce documents when being cross-examined in writing, but is under no such obligation when being cross-examined orally.¹¹ This would create inconsistent procedural rights depending on whether cross-examination occurs orally or in writing. Such inconsistency should be avoided. Moreover, the applicants' proposal contradicts this Court's repeated confirmation that a witness is under no obligation to give undertakings when being cross-examined on their affidavit. The modifications proposed by the applicants are untenable.

PART IV – ORDER SOUGHT

20. For the reasons above, the respondents requests that the Jost applicants' motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Ottawa, in the province of Ontario, this 12th day of July, 2022.

David Aaron
Counsel for the Respondents

¹⁰ *Preventous Collaborative Health* at [para 16](#); *Ottawa Athletic Club* at [para 134](#); *Jim Shot Both Sides* at [para 29](#); *Ward* at [para 3](#)

¹¹ Applicants' Notice of Motion at paras. 9 and 10, Motion Record Tab A p 10, and Written Submissions at para 8

PART V – LIST OF AUTHORITIES

CASELAW

1. *Autodata Ltd. v. Autodata Solutions Co.*, [2004 FC 1361](#)
2. *Jim Shot Both Sides v. Canada*, [2021 FC 280](#)
3. *Maheu v. IMS Health Canada*, [2003 FCT 647](#)
4. *Nguesso v. Canada (Citizenship and Immigration)*, [2015 FC 102](#)
5. *Ottawa Athletic Club v. Athletic Club Group Inc.*, [2014 FC 672](#)
6. *Preventous Collaborative Health v. Canada (Health)*, [2020 CanLII 32965 FC](#)
7. *Trevor Nicholas Construction Company Limited v. Canada*, [2008 FC 306](#) (CanLII)
8. *Ward v Samson Cree Nation*, [2001 FCT 990](#)

APPENDIX A - QUESTIONS AT ISSUE

Question No.	Question/Document	AGC Position
12	Will you undertake to provide true complete copies of the filled in template and schedules at Exhibit “A” regarding each of the Applicants Edward Cornell and Vincent Gircys that the RCMP provided to the financial institutions?	A witness is not required to provide undertakings on a cross-examination on their affidavit. There is no entitlement to broad documentary disclosure or discovery as in an action.
21	Will you undertake to provide true complete copies of the entire contents of the investigation files of the Applicants, Edward Cornell and Vincent Gircys, regarding any purported activity prohibited by sections 2 to 5 of the Emergency Measures Regulations P.C. 2022-0107?	A witness is not required to provide undertakings on a cross-examination on their affidavit. These documents are not relevant to the matters raised by this application. There is no entitlement to broad documentary disclosure or discovery as in an action. Parties are not entitled to test every detail of every statement in an affidavit against any and all documents that may be in the opposing party’s possession.
47	Under s.5 of the Emergency Economic Measures Order, P.C. 2022-0108 entities set out in section 3 (i.e. service providers, banks etc.) must disclose without delay to the Commissioner of the Royal Canadian Mounted Police or to the Director of the Canadian Security Intelligence Service the existence of property in their possession or control that they have reason to believe is owned, held or controlled by or on behalf of a designated person, and any information about a transaction or proposed transaction in respect of said property. What is the number individuals (i.e. human beings) whose information was disclosed to the	Mr. Beaudoin did not know the answer to this question. He was not obliged to undertake to obtain this information.

Question No.	Question/Document	AGC Position
	Commissioner of the Royal Canadian Mounted Police or to the Director of the Canadian Security Intelligence Service under s.5 of the Emergency Economic Measures Order, P.C. 2022-0108?	
48	What is the number of entities whose information was disclosed to the Commissioner of the Royal Canadian Mounted Police or to the Director of the Canadian Security Intelligence Service under s.5 of the Emergency Economic Measures Order, P.C. 2022-0108?	Mr. Beaudoin did not know the answer to this question. He was not obliged to undertake to obtain this information.
50	Can you undertake to produce the information from services providers and financial institutions regarding the Applicants Edward Cornell and Vincent Gircys that was disclosed under s.5 of the Emergency Economic Measures Order, SOR/2022-22 to the Commissioner of the Royal Canadian Mounted Police or to the Director of the Canadian Security Intelligence Service?	A witness is not required to provide undertakings on a cross-examination on their affidavit. There is no entitlement to broad documentary disclosure or discovery as in an action. The documents are not in the power, possession or control of the affiant, in any event.
52	Can you undertake to produce a true copy of the mandate of the Incident Response Group referred to in your affidavit?	Not relevant. A witness is not required to provide undertakings on a cross-examination on their affidavit. The affiant has no such document in his power, possession or control, in any event.
53	Can you undertake to produce true copies of all minutes, notes, and records before and created by the members and attendees of the Incident Response Group meetings on February 10, 12 and 13, 2022 referred to in your affidavit?	Not relevant. A witness is not required to provide undertakings on a cross-examination on their affidavit. This request has been addressed by email from counsel for the AGC dated July 5, 2022 and will be further addressed via the July 18, 2022 motion re: s. 39 of the <i>Canada Evidence Act</i>.

Question No.	Question/Document	AGC Position
		The affiant has no such document in his power, possession or control, in any event.
74	It is understood that the RCMP created a document in 2021 regarding the status of the Canadian pipeline and railway protests titled “ Royal Canadian Mounted Police Situation Report ” that was authored and provided department heads of Indigenous Services Canada and Crown-Indigenous Relations prior to an October 19, 2021 meeting between them and Commissioner Brendan Lucki of the RCMP. The RCMP would have completed such “situation reports” or like reports with a different title regarding the protests and purported blockades in Ottawa and throughout Canada between January 27, 2022, and February 14, 2022?	Not relevant. This is not a proper question. It is unclear what documents are being requested or what is being asked.
75	Will you undertake to produce all or any of the “situation reports” or like reports with a different title regarding the protests and purported blockades in Ottawa and throughout Canada between January 27, 2022, and February 14, 2022 that were authored or issued by the RCMP prior to the invocation of the Emergencies Act on February 14, 2022?	Not relevant. A witness is not required to provide undertakings on a cross-examination on their affidavit. There is no entitlement to broad documentary disclosure or discovery as in an action.